FCC 94-357

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115

Order

Adopted: December 30, 1994 **Released:** January 10, 1995

By the Commission:

I. INTRODUCTION

1. The Commission has received stay requests from the Personal Communications Industry Association (PCIA) and the Mobile and Personal Communications 800 Section of the Telecommunications Industry Association (TIA) with respect to the effective date of certain aspects of our recently adopted *Report and Order* in this docket, which completely revises Part 22 of our rules and goes into effect on January 1, 1995.[1] Specifically, PCIA requests that we stay implementation of the *Part 22 Order* with respect to (1) new application processing rules for 931 MHz paging, and (2) our policy prohibiting two Part 22 licensees from sharing a single transmitter. TIA requests that we stay implementation of Section 22.919 of our Rules, which requires manufacturers seeking type-acceptance of new cellular telephone equipment to use electronic serial numbers (ESNs) that cannot be altered once they are set by the manufacturer. For the reasons stated below, we have decided to (1) stay the effective date of the 931 MHz paging rules on our own motion pending resolution of previously pending petitions for reconsideration under the old 931 MHz rules, (2) grant PCIA's petition with respect to sharing of transmitters, and (3) deny TIA's motion.

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[1] *Report and Order*, CC Docket No. 92-115, FCC 94-201, 9 FCC Rcd 6513 (1994) (*Part 22 Order*).

II. DISCUSSION

A. 931 MHz Paging Rules

2. In the *Part 22 Order*, we adopted new procedures for processing of 931 MHz paging applications, based on frequency-specific applications and use of competitive bidding to select licensees in the event of mutually exclusive applications.[2] We further stated that all 931 MHz applicants with applications pending when the new rules went into effect would be given 60 days from the effective date of the new rules to amend their applications in accordance with these procedures.[3]

3. The *Part 22 Order* provides that the new 931 MHz application procedures go into effect on January 1, 1995.[4] PCIA requests that we stay implementation of these procedures on the grounds that a substantial backlog of paging applications filed under the old rules continues to exist, and that significant confusion would result from attempting to process this backlog under the new procedures.[5] We do not address the merits of PCIA's petition at this time, however, but instead will temporarily stay implementation of the 931 MHz application procedures on our own motion.

4. Our temporary stay of the new procedures arises directly from our discussion of 931 MHz paging in the *Part 22 Order*. In the *Order*, we observed that certain paging applications that had previously been granted, denied, or dismissed under the old rules remained before us in the form of petitions for reconsideration and applications for review. We concluded that these pending petitions and applications for review should be decided, to the extent possible, under our existing paging rules, and instructed the Chief of the Common Carrier Bureau to act on them before the effective date of the new rules.[6] We further stated that if the Bureau or the Commission had not acted on these cases by January 1, 1995, we would stay the effect of new Section 22.541 of our Rules concerning 931 MHz applications and also stay the 60-day amendment procedure for all pending 931 MHz applications until these cases were resolved by order.[7]

5. Although we have endeavored to resolve all pending 931 MHz reconsiderations and applications for review by January 1, 1995, we have determined that additional time is required

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[2] *Part 22 Order*, para. 98.

[3] *Id.*

[4] *Id.*, para.112.

[5] PCIA Petition for Partial Stay at 4-5.

[6] *Part 22 Order*, paras. 98-99.

[7] *Id.*, para. 99 n.171.

to resolve certain of these cases.[8] Therefore, we are staying the effective date of new Section 22.541 of our Rules and the opening of the 60-day window for amendment of pending 931 MHz applications described above until further notice.[9] We also observe that under our *Third Report and Order* in GN Docket No. 93-252, Section 22.541 of the Rules is superseded by Section 22.131 as of January 2, 1995.[10] Therefore, this order also stays implementation of Section 22.131 as it applies to 931 MHz paging. In light of this action on our own motion, we conclude that action on PCIA's request to stay the effective date of the 931 MHz application processing rules is unnecessary for the time being. We therefore defer consideration of PCIA's petition until further notice.

B. Sharing of Transmitters

6. In the *Part 22 Order*, we stated that as a matter of policy, we intended to prohibit two or more Part 22 licensees from sharing a single transmitter.[11] This policy was established to address concerns that shared use of the same transmitter by two different licensees could raise questions regarding the control of and responsibility for the transmitter. In addition, we were concerned that outages of shared transmitters would cause wider disruption of service than outages of transmitters owned by a single provider.[12] PCIA requests that we stay implementation of this policy pending reconsideration on the grounds that (1) the policy was adopted without prior notice or comment in violation of the Administrative Procedure Act; (2) the Commission has previously authorized dual licensing of transmitters under Part 22 and continues to do so in the private services; (3) reversing this policy would cause irreparable harm to licensees and the public, particularly in rural areas where shared transmitters are used because it is not

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[8] We also note that since the *Part 22 Order* was adopted, responsibility for licensing of Part 22 services has been transferred from the Common Carrier Bureau to the newly established Wireless Telecommunications Bureau. We therefore delegate authority to the Chief of the Wireless Telecommunications Bureau to act on all pending petitions for reconsideration and applications for review of 931 MHz applications as described in paragraph 99 of the *Part 22 Order*.

[9] The stay of the affected rules is procedural in nature, and therefore is not subject to the notice and comment requirements of the Administrative Procedure Act. *See* 5 U.S.C. §§ 553(b)(A), 553 (d); Kessler v. FCC, 326 F.2d 673, 680-681 (D.C. Cir. 1963). Pursuant to 5 U.S.C. § 553(d)(3), we further conclude that good cause exists to stay these rules as of the adoption date of this Order, as the rules would otherwise go into effect on January 1, 1995. Until such time as the stay is lifted, our prior procedures for processing of 931 MHz applications remain in effect.

[10] *See Third Report and Order*, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, FCC 94-212, adopted August 9, 1994, released September 23, 1994 (59 Fed. Reg. 59945, November 21, 1994) (*CMRS Third Report and Order*), Appendix B at 13, 19.

[11] *Part 22 Order*, para. 71.

[12] *Id.*

economically feasible for licensees to provide service with separate transmitters.[13]

7. Section 1.429 (k) of the Commission's Rules provides that the Commission may stay the effective date of an order pending reconsideration by the Commission upon a showing of "good cause."[14] In evaluating whether good cause exists, we have used the criteria set forth in *Virginia Petroleum Jobbers Association v. F.P.C.* 259 F.2d 921 (D.C. Cir. 1958) as explained in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F.2d 841 (D.C. Cir. 1977) (*Holiday Tours*). Under the *Holiday Tours* standard, the petitioner must demonstrate (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[15]

8. On review of the pleading, we are persuaded that PCIA has met the *Holiday Tours* standard for granting a stay. First, we conclude that PCIA has raised a serious question on the merits. As PCIA notes, we have allowed dual licensing of Part 22 transmitters in the past, and we continue to allow dual licensing in the private services. We are concerned that reversing this policy with respect to Part 22 services could result in inconsistent treatment of similar services, in violation of the principle of regulatory parity.[16] We are also concerned that prohibiting dual licensing could irreparably harm licensees and the public in rural areas where transmitters are often used on a dual-licensed basis because it is economically impractical to support separate facilities. On the other hand, a stay of the new policy will not cause harm to other parties to the proceeding or the public. Although we expressed concern in the *Part 22 Order* that use of shared transmitters could magnify the effect of disruptions of service, PCIA points out that outages are more likely to be detected and corrected if the transmitter is used and monitored by multiple licensees.[17] Finally, we believe that the public interest favors grant of a stay while we further review our policy regarding sharing of transmitters. For all of the above reasons, we conclude that implementation of our policy against dual licensing of transmitters should be stayed, effective as of the adoption date of this Order,[18] pending reconsideration of this issue.

[13] PCIA Petition at 6-9.

[14] 47 C.F.R. § 1.429(k).

[15] *Holiday Tours* at 842.

[16] *See CMRS Third Report and Order*, paras. 4-14. We do not agree with PCIA's argument that the prohibition against dual licensing was not subject to notice and comment and therefore violates the Administrative Procedure Act. In fact, the proposal was noticed in CC Docket No. 94-46, which was consolidated with CC Docket No. 92-115 in the *Part 22 Order*. *See Notice of Proposed Rule Making*, CC Docket No. 94-46, 9 FCC Rcd 2578, 2580 (1994); *Part 22 Order*, para. 3.

[17] PCIA Petition at 8.

[18] *See* note 9, *supra*.

C. Cellular Electronic Serial Numbers

9. To combat the problem of cellular fraud, we adopted a new rule in the *Part 22 Order* requiring cellular telephone manufacturers to install unalterable electronic serial numbers (ESNs) in all new cellular telephone equipment for which type-acceptance is sought after January 1, 1995.[19] Specifically, the new Section 22.919(c) of the Rules provides that the ESN must be factory set and must not be "alterable, transferable, removable or otherwise able to be manipulated." The purpose of this requirement is to prevent the reprogramming of cellular telephones with unauthorized or "cloned" ESNs. In adopting this requirement, we stated that the new rule would not require modification or retrofitting of existing cellular equipment. We noted, however, that anyone who altered the ESN of a cellular telephone or who used such a telephone knowing the ESN was altered would be in violation of the Communications Act and our rules.[20]

10. On December 19, 1994, TIA filed a request for stay of Section 22.919(c) pending review of TIA's simultaneously filed petition for reconsideration.[21] TIA argues that requiring the use of unalterable or "hardened" ESNs will impose significant new costs on manufacturers and will cause customer dissatisfaction by preventing manufacturers' authorized agents from making routine repairs and upgrades of cellular equipment in the field.[22] TIA also contends that hardened ESNs are ineffective in combatting fraud and that the Commission should instead develop anti-fraud rules that rely on encrypted authentication methodologies currently being developed by the cellular industry.[23]

11. The Cellular Telecommunications Industry Association (CTIA) opposes TIA's motion for stay.[24] CTIA contends that TIA has failed to demonstrate that the rule is likely to be overturned on reconsideration or that irreparable harm would result from denial of a stay. Specifically, CTIA disputes TIA's contention that implementing the rule will impose unacceptable costs on manufacturers and cellular customers.[25] CTIA also argues that immediate implementation of the rule is essential to combat fraudulent "cloning" of ESNs, which costs the cellular industry approximately one million dollars a day. While CTIA acknowledges that the new rule will not prevent all fraud, it contends that it is an important weapon that will have a

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[19] *Part 22 Order*, para. 62.

[20] *Id.*

[21] TIA Motion for Stay at 1.

[22] *Id.* at 14-16.

[23] *Id.* at 10-13.

[24] CTIA Opposition to Motion for Stay at 1.

[25] *Id.* at 3-4.

significant effect even as the industry develops other anti-fraud measures.[26]

12. On review of the pleadings, we conclude that TIA has not met the standard for granting a stay under *Holiday Tours*.[27] First, without prejudging TIA's reconsideration petition, we conclude that TIA has not shown that the petition is likely to prevail on the merits. In particular, TIA's argument that the Commission should adopt anti-fraud rules based on authentication procedures does not compel a stay of our ESN protection rules; instead, if TIA's alternative methodology proves effective, it offers a potentially complementary level of protection against fraud rather than a substitute for ESN regulation.

13. Second, we are not persuaded that either manufacturers or cellular customers will be irreparably harmed if the stay motion is not granted. The new ESN rule applies only to new equipment receiving type acceptance after January 1, 1995. Thus, manufacturers may continue to produce equipment under previous type-acceptances without being required to install hardened ESNs. Furthermore, the new rules will not make "in the field" equipment repairs impossible: as CTIA points out, authorized service centers may continue to make repairs that involve switching circuit boards with factory-set ESNs so long as they notify the carrier of the change.[28] Finally, we agree with CTIA that the cost of implementing the new rule must be weighed against the far greater cost of allowing ESN "cloning" to go virtually unchecked if the rule is not implemented.[29] We therefore conclude that TIA's motion for stay should be denied.

III. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the effective date of new Section 22.541 of our Rules, the application of new Section 22.131 of our Rules insofar as it applies to 931 MHz paging applications, and the 60-day amendment procedure for all pending 931 MHz paging applications described in paragraph 98 of the *Part 22 Order* ARE STAYED, effective as of the adoption date of this Order, until further notice.

15. IT IS FURTHER ORDERED that action on the Petition for Partial Stay filed by the Personal Communications Industry Association on December 19, 1994, with respect to implementation of new 931 MHz processing rules IS DEFERRED until further notice.

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[26] *Id.* at 6-7.

[27] *See* para. 7, *supra.*

[28] CTIA Opposition at 6 n.11.

[29] Although TIA contends that the cost of implementing of the ESN rule could approach $30 million, it fails to specify how this figure was calculated, and we accord it little weight. *See* TIA Motion at 14. Even if we were to accept TIA's figure, CTIA estimates that cellular fraud costs the industry approximately $1,000,000 per day. CTIA Opposition at 6; Affidavit of Thomas McClure at 1. Thus, staying the rule for even a few months while reconsideration is pending could be more costly for the industry than the cost of implementing the rule as estimated by TIA.

16. IT IS FURTHER ORDERED that the effective date of the policy prohibiting two licensees from sharing a single transmitter, as described in paragraph 71 of the *Part 22 Order*, IS STAYED, effective as of the adoption date of this Order, until further notice.

17. IT IS FURTHER ORDERED that the Motion for Stay filed by the Mobile and Personal Communications 800 Section of the Telecommunications Industry Association on December 19, 1994, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary